

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

No. 74-2045

United States Court of Appeals FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD.

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL NO. 17, 17A, AND 17B, AFL-CIO.

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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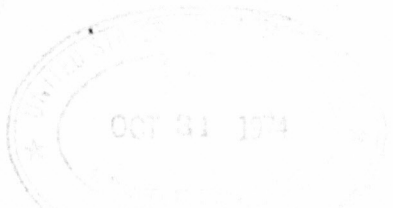
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(4)(i)(ii)(B) of the Act by picketing neutral employers with an object of forcing them to cease doing business with Firelands Sewer & Water Construction Company, Incorporated.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued April 19, 1974, against International Union of Operating Engineers, Local No. 17, 17A, and 17B, AFL-CIO ("the Union"). The Board's Decision and Order (A. 2-32)¹ was issued by a panel consisting of members Jenkins, Penello, and Kennedy and is reported at 210 NLRB No. 30. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred at Buffalo, New York.

I. THE BOARD'S FINDINGS OF FACT

A. Background

For several years prior to the events involved here, the Buffalo Sewer Authority ("the Authority") used Squaw Island as a dumping ground for solid waste materials (A. 4-5; 36-37). The Island, located in the Niagara River, is separated from the River's east bank by the 300-foot-wide Black Rock Channel (A. 7; 33, 44). Cars may cross the Channel on the Authority Access Road at the north end of the Island and on the Ferry Street Bridge at the south end of the Island (A. 7-8; 33, 41). The two bridges are about 4000 feet apart and are connected by the Island road, which runs parallel to the Channel along the Island's eastern shore (A.

¹ "A." references are to the Appendix to the briefs filed herein. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

7-8; 33, 41, 48, 65). The Authority Access Road, the Ferry Street Bridge, and the Island road are all open to the general public; access to the rest of the Island is controlled by the Authority Gate located along the Island road about 500 feet north of the Ferry Street Bridge (A. 8-10; 33, 48, 57, 73).

In December 1972, the Authority solicited bids for the removal of waste material from the Island in preparation for the construction of a waste treatment plant (A. 5; 36-37). The Firelands Sewer & Water Construction Company, Incorporated ("Firelands") was awarded the contract in June, 1973 (A. 5; 37).² Firelands then contracted with the Dunbar & Sullivan Dredging Company ("Dunbar") for the construction of a dock on the Island; Dunbar, in turn, contracted with Herbert F. Darling, Incorporated ("Darling") for pile-driving material and personnel (A. 4-5, 9-10; 49-51, 61).

Firelands, whose employees were not represented by any labor organization, began work on Squaw Island about September 1 (A. 8; 39-40). At all times relevant herein, Firelands' employees performed work only in the immediate vicinity of a dock being constructed on the Channel side of the Island between the Authority Gate and the Access Road (A. 9, 21; 33, 40, 43-44, 52, 56, 65, 70-71). They reached the dock by driving their cars across either the Access Road or the Ferry Street Bridge and then through the Authority Gate (A. 9, 21; 40-41, 47, 70). Firelands' employees never performed any work in the Channel itself, nor did they ever use the Channel as an alternate means of reaching the dock-site from the mainland (A. 18, 21; 43, 47-48, 52, 56, 70-71).

² All further dates refer to 1973 unless otherwise indicated.

B. Union picketing at the Squaw Island jobsite

On October 9, the Union began picketing at Squaw Island with picket signs captioned:

Employees of Firelands Sewer and Water Construction Company, Inc. are employed to perform Operating Engineers work on this job under wage and other conditions of employment inferior to those enjoyed by employees represented by the Operating Engineers Local No. 17, 17A, and 17B, affiliated with the AFL-CIO (A. 8-9; 69).

The October 9 picket lines were established both at the mainland end of the Access Road and within 50-feet of the Authority Gate on Squaw Island itself (A. 9-10; 40-41, 44-45, 50).

Late in the afternoon on October 9, two Dunbar barges arrived at the Island and were moored along the Island's east bank just north of the Ferry Street Bridge (A. 9; 33, 42, 50). The barges, which carried heavy equipment displaying the Dunbar name, were located about 200 feet south of the Authority Gate and about 2500 feet south of the proposed docksite where Firelands' employees were working (A. 9-10; 33, 42-43, 46, 52, 60). A Darling jobsite had also been established by this time on the mainland side of the Channel directly across from the Dunbar barge moorings (A. 11; 33, 61). A sign posted at the jobsite gate stated that the entrance was to be used exclusively by Darling employees (A. 11; 61-62). Dunbar planned to cross the Channel to the Darling jobsite the following morning, October 10, to pick-up Darling employees before proceeding north to the proposed docksite (A. 10; 51-52, 61).

Early that next morning, however, most union pickets left the immediate area of the Authority Gate and moved approximately 200 feet south, where they commenced picketing on the Island road within five feet of the newly-arrived Dunbar barges (A. 10; 42, 46, 50-51, 57, 63).

The picketing continued adjacent to the barges until the barges were removed on October 19 (A. 13-14; 43, 53). During this period, the Dunbar employees, who were represented by a Union affiliate, drove across the Ferry Street Bridge, parked at the south end of the Island, and crossed the picket line, to work on the barges (A. 9-11; 51, 57).

On October 10, two Union picket boats also began picketing in the Channel from the Ferry Street Bridge north to the proposed docksite with the same picket signs that were being carried on the Island (A. 11-12; 43, 52, 63). When a Dunbar rowboat crossed the Channel to Darling's jobsite in order to pick up Darling employees, the picket boats were cruising between the barges and the Darling jobsite (A. 12; 43, 52-53, 63). Darling's employees refused to enter the rowboat (A. 12; 52-53, 63-64). The Union boats picketed in the Channel between Dunbar's barges and the Darling jobsite from October 10 through October 19; Darling's employees reported to their jobsite each morning during this period but refused to perform any work on Squaw Island (A. 12-13; 47, 64-65). On October 19, Dunbar removed its barges and rescinded its contract with Darling because the latter was unable to supply pile-driving personnel as required by the contract (A. 12-13; 53-54, 64).

Union picketing continued on the Island and in the Channel throughout November (A. 18; 68). On November 14, a Dunbar tugboat was proceeding north up the Channel to the proposed docksite when it encountered a picket boat approximately 200 feet north of the Ferry Street bridge (A. 14; 54-55). The tugboat captain refused to pass the picket boat and was in the process of turning the tug around when Dunbar management official Albert Headley engaged picket James Mann in conversation from the bow of the tug (A. 14; 54-55, 57-58). Headley asked Mann, who was then about 75 feet away, if there was a picket line and Mann nodded affirmatively (A. 14-15; 54-55, 58-59). When Headley asked

who they were picketing, Mann replied "Firelands" (A. 14: 55). Headley then explained that Dunbar employed union personnel and asked if the Union was also picketing Dunbar, whereupon Mann replied, "Yes, sir" (A. 14-16: 55). The tug, which displayed the Dunbar name, attempted to reach the docksite again on November 16 and 17, but returned south on both occasions upon encountering the picket boat in the Channel (A. 14, 16-17: 56, 60).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board, in agreement with the Administrative Law Judge, concluded that the Union violated Section 8(b)(4)(i)-(ii)(B) of the Act by picketing Dunbar at its bargesite and Darling in the Channel with an object of forcing them to cease doing business with Firelands (A. 21-23, 28-29).³ The Board's order requires the Union to cease and desist from the unfair labor practices found and from "in any manner" inducing the employees of "any other person" to strike or from "by any means" threatening any person with an object of forcing Dunbar, Darling, the Authority, or any person to cease doing business with Firelands (A. 24-25, 30-31). Affirmatively, the Board's order requires the Union to post appropriate notices (A. 25-28, 30-31).

³ The Board, member Kennedy dissenting, found that a threat made by the Union in July 1973, to the Buffalo Sewer Authority to engage in informational picketing if Firelands were awarded the Squaw Island contract did not constitute an independent violation of Section 8(b)(4)(ii)(B) (A. 19, 29-32).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(4)(i)(ii)(B) OF THE ACT BY PICKETING NEUTRAL EMPLOYERS WITH AN OBJECT OF FORCING THEM TO CEASE DOING BUSINESS WITH FIRELANDS SEWER & WATER CONSTRUCTION COMPANY, INCORPORATED.

Section 8(b)(4) of the Act provides in relevant part that:

It shall be an unfair labor practice for a labor organization or its agents —

- (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment to . . . perform any services; or
- (ii) to threaten, coerce, or restrain any person engaged in commerce . . ., where in either case an object thereof is —
 - (B) forcing or requiring any person . . . to cease doing business with any other person. . . .

These provisions reflect “the dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.” *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). See also, *N.L.R.B. v. Local 825, International Union of Operating Engineers*, 400 U.S. 297, 302-303 (1971). Since the Union in the instant case was engaged in a primary dispute with Firelands, it was thus entitled to bring pressure to bear upon Firelands, but not upon the “unoffending” secondary employers at the Squaw Island jobsite. The question presented, then, is whether the Union picketing at Squaw Island

exceeded the limits of permissible primary activity directed at Firelands and involved instead a deliberate effort to enmesh neutral employers Dunbar and Darling in the dispute.

As the Supreme Court has noted, the "distinction between legitimate 'primary activity' and banned 'secondary activity' . . . does not present a glaringly bright line." *Local 761, International Union of Electrical Workers v. N.L.R.B.*, 366 U.S. 667, 673 (1961). Where the primary and neutral employers occupy separate work sites, the necessary line-drawing is relatively easy. Generally speaking, union picketing occurring at the primary employer's premises seeking only the disruption of his normal operations is considered primary — and thus protected — activity, whereas picketing extending to the separate premises of the neutral employer designed to disrupt his operations is considered secondary and prohibited. Compare *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 671 (1951) with *N.L.R.B. v. Associated Musicians, Local 802*, 226 F.2d 900, 903-906 (C.A. 2, 1955), cert. denied, 351 U.S. 962. However, where, as here, the primary and neutral employers perform separate work on the same general premises, more difficult problems frequently arise. In such "common situs" situations, the union's right to apply legitimate pressure against the primary employer must be accommodated with the neutral employer's intended immunity from the full impact of the labor dispute. See, *United Steelworkers v. N.L.R.B.*, 376 U.S. 492, 497 (1964); *Local 761, International Union of Electrical Workers v. N.L.R.B.*, *supra*, 366 U.S. at 673-674; *United Steelworkers v. N.L.R.B.*, 289 F.2d 591, 594-595 (C.A. 2, 1961).

As an aid in drawing this line between legitimate and prohibited common situs picketing, the Board, in *Moore Dry Dock*,⁴ developed certain

⁴ *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549 (1950).

criteria which were held to be "presumptive" of valid primary activity. These criteria were summarized by the Supreme Court as follows:

- (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises; (2) that the primary employer be engaged in his normal business at the situs; (3) that the picketing take place reasonably close to the situs; and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

Local 761, International Union of Electrical Workers v. N.L.R.B., *supra*, 366 U.S. at 677. But even compliance with the *Moore Dry Dock* tests would be no defense where other evidence reveals that an object of ostensibly primary picketing is to coerce the secondary employer. *International Brotherhood of Electrical Workers, Local 480 v. N.L.R.B.*, 413 F.2d 1085, 1089 (C.A.D.C., 1969). "In determining the objectives . . . the Board is entitled to look to the totality of the union's conduct, and . . . is not bound by the union's signs or professed object in picketing." *N.L.R.B. v. Local 25, International Brotherhood of Electrical Workers*, 383 F.2d 449, 453 (C.A. 2, 1967).

As shown by the facts set out *supra*, pp. 3-5, the Union's picketing at Squaw Island failed to comply with the third *Moore Dry Dock* requirement that common situs picketing take place "reasonably close" to the situs of the dispute. Thus, Union Business Representative Thomas McPartlan admitted that the Union could have reached all Firelands' employees by picketing on the Access Road and at the Authority Gate (A. 18; 70). Indeed, pickets were stationed on the Access Road and within 50 feet of the Gate on October 9, before any neutral employers arrived at Squaw Island. On October 10, however, when Dunbar barges arrived at the Island, the Authority Gate pickets moved to a new position 200 feet south of the Gate and immediately adjacent to the Dunbar barges.

Although no Firelands' employees ever approached the barges, the pickets remained at the Dunbar worksite until October 19, when Dunbar was forced to remove the barges.

The morning of October 10, Union picket boats also established a picket line in the Channel between Darling's mainland worksite and the Dunbar barges. The Channel picketing, which continued in this immediate vicinity for ten days, induced Darling employees to refuse to work on the Dunbar barges, which, in turn, forced the cancellation of Darling's contract. At the time the Union stationed its picket boats in the path of the Darling employees, the Union was aware that Firelands was not using the Channel for any purpose whatsoever and that the nearest Firelands employees were working in the area of a proposed dock more than 2000 feet north of the Dunbar and Darling worksites (A. 18; 70-71).

Since the expanded picketing activity did not carry the Union's appeal to any additional Firelands employees, it is clear that the road and Channel picketing adjacent to the Dunbar and Darling worksites was not "reasonably close" to the situs of the dispute, but was instead intended to enmesh Dunbar and Darling in the Union's dispute with Firelands. See, *N.L.R.B. v. Local 282, International Brotherhood of Teamsters*, 428 F.2d 994, 1001-1003 (C.A. 2, 1970); *United Steelworkers v. N.L.R.B.*, 289 F.2d 591, 594-595 (C.A. 2, 1961); *N.L.R.B. v. Lafayette Building and Construction Trades Council*, 445 F.2d 495, 497-498 (C.A. 5, 1971); *N.L.R.B. v. General Drivers & Dairy Employees*, 76 LRRM 3002 (C.A. 7, 1971), cert. denied, 404 U.S. 912; *N.L.R.B. v. Carpenters District Council*, 383 F.2d 89, 94-95 (C.A. 8, 1967).

The conversation on November 14 between Union picket James Mann and Dunbar official Albert Headley provides additional evidence of the Union's unlawful intention to involve neutral employers in the dispute. On that date a Dunbar tugboat, conspicuously displaying the Dunbar

name, was headed up the Channel when it encountered a Union picket boat operated by pickets James Mann and Harry Gerlach. While the tug was turning around, Headley engaged Mann in a conversation which ended with Headley asking if the Union was picketing Dunbar, to which Mann replied, "Yes, sir" (A. 55).⁵ This direct admission that the Union picketing was aimed at Dunbar further supports the Board's finding that the Union's activities were designed to bring unlawful secondary pressure to bear upon Firelands. *N.L.R.B. v. Milk Drivers and Dairy Employees, Local 584*, 341 F.2d 29, 32 (C.A. 2, 1965), cert. denied, 382 U.S. 816; *N.L.R.B. v. Associated Musicians, Local 802*, *supra*, 226 F.2d at 903-904; *N.L.R.B. v. Carpenters District Council*, *supra*, 383 F.2d at 95.

As this Court observed regarding alleged Section 8(b)(4)(B) picketing in *Bedding, Curtain, and Drapery Workers Union, Local 140 v. N.L.R.B.*, 390 F.2d 495, 499 (C.A. 2, 1968), cert. denied, 392 U.S. 905: "Whether the union's conduct had an improper 'object' is a question of fact," and, like all questions of fact, the Board's determination is entitled to affirmance if supported by substantial evidence. *Id.* at 500. We submit that the Union's failure to observe the *Moore Dry Dock* standards

⁵ At the unfair labor practice hearing, Mann denied making this statement (A. 15; 76). He did admit however, that the conversation concerned the Union picketing, and that he had no trouble hearing Headley's voice (A. 15; 76-78). The Administrative Law Judge explicitly credited the testimony of Headley who impressed him as being a more credible witness than Mann (A. 16). As this Court has repeatedly stated, "questions of credibility are for the trier of fact and . . . we will not upset . . . a finding of an Examiner which is grounded upon . . . the witness' demeanor or [his] evaluation of oral testimony as reliable" unless it is "hopelessly incredible" on its face. *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965). Accord: *N.L.R.B. v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 937 (C.A. 2, 1970); *N.L.R.B. v. A & S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

for common situs picketing, as well as picket Mann's express statement that picketing was directed at Dunbar, provide substantial support for the Board's finding that the Union's picketing had an improper object of involving neutral employers in its dispute with Firelands, in violation of Section 8(b)(4)(i)(ii)(B) of the Act.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Board's order should be enforced in full.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 25th day of October, 1974